



## MEMORANDUM

From: Criminal Study Group  
To: All Commissioners  
cc: Andrew J. Heimert and Commission Staff  
Date: July 22, 2005  
Re: Proposed Criminal Study Plan

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At the Commission meeting held January 13, 2005, the Commission voted to defer study of sentencing in criminal antitrust cases “to assess further developments in light of the Supreme Court’s decisions in *United States v. Booker* and *United States v. Fanfan*, 125 S. Ct. 738 (2005).” Minutes of Meeting, p. 2.

Since then, the Justice Department’s enforcement policy in the wake of *Booker/Fanfan* has been clarified. See Scott D. Hammond, *Antitrust Sentencing In The Post-Booker Era: Risks Remain High For Noncooperating Defendants* (Mar. 30, 2005). In addition, the applicable antitrust Sentencing Guidelines have been revised. Sentencing Guidelines Manual § 2R1.1; see 70 FED. REG. 8870-71 (Feb. 23, 2005). Notwithstanding these developments, substantial confusion remains on critical issues. These include:

- For fines in excess of the Sherman Act maximum of \$100 million, which must be based on the double the gain or loss provision of 18 U.S.C. § 3571(d), should sentences continue to be based on 20% of gross sales (subject to the effect of Guidelines multipliers and cooperation discounts)?

- Does “double gain or loss” mean, as the Justice Department believes, double the gain or loss from *all* coconspirator sales? Or is the better view that it refers to the defendant’s sales only?
- In determining corporate fines, should there be a means for differentiation based on differences in the severity or culpability of the behavior?
- Given the uncertainty surrounding corporate fines, should there be new legislation or a substantial revision of the Guidelines, to account for issues unique to antitrust prosecutions?

The issues just listed are important, exist now, and are unlikely to be clarified or eliminated by later developments. The Criminal Study Group therefore recommends that the Commission consider these questions under the banner of the following issue: “Should the statutes and guidelines establishing criminal fines for price fixing and related offenses be amended in light of the Supreme Court’s decision in *Booker* and other developments?”, and, in that regard, that a hearing on these issues be scheduled.